05-1480

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STOLT-NIELSEN, S.A., ET AL.
Plaintiffs-Appellees,
v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(Honorable Timothy J. Savage, Jr.)

ANSWER OF THE UNITED STATES OF AMERICA TO PETITIONS FOR REHEARING EN BANC

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INTRODUCTION

This case is about a conditional leniency (or non-prosecution) agreement ("Agreement") between Appellees, Stolt-Nielsen, S.A., et al. ("SNTG"), and the United States Department of Justice's Antitrust Division ("Division"), and whether that Agreement gave SNTG a right not to be indicted. The panel correctly explained that no court has ever concluded that any similarly worded agreement granted such a right.

The Agreement was executed pursuant to the Division's Corporate Leniency Policy, under which the Division agrees not to prosecute companies that report their illegal antitrust activity to the Division and that otherwise meet the qualifying conditions for leniency. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 179 (3d Cir. 2006). The Agreement provides that in exchange for SNTG's representation that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity," which representation was expressly "[s]ubject to verification" by the Division, and SNTG's pledge to cooperate fully with the Division, including providing "a full exposition of all facts known to SNTG relating to the anticompetitive activity being reported," the Division "agree[d] not to bring any criminal prosecution against SNTG for any act or offense . . . being reported." *Id.* at 179-80 (quoting JA73-74). The Agreement also expressly provided that "[i]f the Antitrust Division at anytime determines that SNTG has violated th[e]

Agreement, th[e] Agreement shall be void," and the Division could then revoke SNTG's "conditional acceptance" into the Leniency Program and "*thereafter initiate a criminal prosecution against SNTG*, without limitation," including using "any documentary or other information provided by SNTG . . . against SNTG in any such prosecution." *Id.* (quoting JA74-75) (emphasis added). Indeed, SNTG's counsel admitted that SNTG "understood" "what the consequences were" if circumstances later "[led] to termination of the leniency agreement." JA482.

After the Division received evidence that SNTG, including its Managing Director Wingfield, had continued to meet with its competitors and participate in the conspiracy for months after discovering it, and that SNTG had withheld information about the true extent of the conspiracy, the Division promptly suspended SNTG's obligation to cooperate and notified SNTG that it was considering withdrawing the conditional leniency. 442 F.3d 180-81; JA82, 412-13. Subsequently, SNTG and Wingfield filed complaints alleging that the Agreement prohibited the Division from indicting them without first obtaining a pre-indictment judicial determination that SNTG had violated the Agreement, and they requested preliminary and permanent injunctions enjoining the Division from indicting them. 442 F.3d at 181; JA52-72, 108-23.

Over the Division's objection that SNTG was not entitled to a pre-indictment hearing or the extraordinary relief of an injunction against an indictment, the court held a two-day hearing after which it issued an order permanently enjoining the United

States from indicting SNTG or Wingfield. JA19. The sole basis for the court's conclusion that SNTG had a due process right to pre-indictment relief was its belief that, if the hearing were held post-indictment, and the "indictment w[as] . . . determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences." JA30-32.

On March 23, 2006, this Court reversed. The panel concluded that, although federal courts have authority to enjoin the executive branch from filing an indictment "in narrow circumstances, . . . this is not such a case." 442 F.3d at 178-79. With respect to the district court's belief that due process entitled SNTG to pre-indictment relief to prevent "irreparable consequences," the panel explained that "other courts have not accepted the argument that the unpleasantness of an indictment brought in good faith constitutes an injury that may be remedied by a pre-indictment injunction, and neither have we." *Id*. at 185 & n.5. The panel likewise rejected SNTG's argument that the Division's conditional promise not to bring a criminal prosecution gave SNTG a right not to be indicted, noting that every court that has addressed the issue has concluded that immunity or non-prosecution agreements "that have promised not to charge or otherwise criminally prosecute a defendant, . . . protect the defendant against conviction rather than indictment and trial." *Id*. at 184. Accordingly, "guided by other cases from the Supreme Court and Courts of Appeals that lead us to conclude that non-prosecution agreements may not form the basis for enjoining indictments before

they issue," the panel determined that "[s]eparation-of-power concerns thus counsel against using the extraordinary remedy of enjoining the Government from filing the indictments." *Id.* at 187.

EN BANC REVIEW IS NOT WARRANTED

Applying well-established case law, the panel correctly rejected SNTG's claim that it has a right not to be indicted. The Agreement creates no such right, courts of equity historically have avoided interfering with criminal investigations, and under the Constitution, the Executive Branch decides whether to seek an indictment. SNTG fails to cite a single case in which a court has taken the extraordinary step of enjoining the Executive Branch from seeking an indictment during an ongoing criminal proceeding in order to protect "property rights."

This matter should now return to the criminal process. The grand jury should complete its investigation and decide whether to issue indictments. If the grand jury does issue an indictment, SNTG will have the opportunity to move to dismiss the indictment and to obtain a full hearing on its arguments. Importantly, this approach will permit the grand jury and the Executive Branch to perform their traditional functions. Moreover, it will end the use by SNTG of the civil litigation process to paralyze a grand jury investigation – already delayed for more than two years while the five-year statute-of-limitations has continued to run and the Division's evidence grows older. The Supreme Court has warned that in grand jury investigations, "delay is fatal"

and expedited judicial proceedings are appropriate. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940); *United States v. Dionisio*, 410 U.S. 1, 17 (1973). If SNTG has used the civil process to avoid the criminal consequences of what the Division believes are SNTG's misrepresentations and failure to honor its cooperation commitments, such delay is particularly unacceptable. The grand jury should be permitted to resume its investigation immediately.

I. SNTG Has No Right Not To Be Indicted

Contrary to SNTG's contention[1], the panel's holding that defenses to a criminal indictment should be litigated post-indictment in the criminal case rather than pre-indictment in a separate civil case does not conflict with decisions of this Court holding that prosecutors should strictly adhere to their promises. S.Pet. 5-9. SNTG's entire claim is built on the faulty premise that the Agreement gave it a right not to be indicted and the erroneous contention that "[t]he panel decision effectively disregards and rewrites the Antitrust Division's contractual promise." *Id.* at 5-6. The panel correctly explained that no court has ever held that any similar agreement, whether termed an "immunity"[2] or "non-prosecution"[3] agreement, and whether worded in terms

[1] References to arguments made by SNTG also include any related arguments made by Wingfield.

[2] *United States v. Bird*, 709 F.2d 388, 392 (5th Cir. 1983).

[3] *United States v. Gerant*, 995 F.2d 505, 509 (4th Cir. 1993).

of a promise "not to charge,"[4] or "not [to] file additional charges,"[5] or "not to prosecute,"[6] or "that there would be no new indictments,"[7] conferred anything more than a right not to be convicted. Indeed, SNTG has not cited any case, and we know of none, in which a federal court has held that any such immunity or non-prosecution agreement – regardless how worded – granted a right not to be indicted. The language in the Agreement – that "the Antitrust Division agrees not to bring any criminal prosecution against SNTG" (JA74) – is indistinguishable from the language relied on by other courts in rejecting exactly the same arguments SNTG makes in this case. Finally, Division officials consistently have described the benefits of the Leniency Policy in terms of avoiding the ultimate penalties that result when a corporation is convicted of a crime: "no criminal conviction, no criminal fine, and non-prosecution protection for all officers, directors, and employees." JA-965; *accord* JA-941 ("Corporate Amnesty Can Mean Zero Fines and No Jail"), 986-87, 995-97.

The Agreement's language is also indistinguishable from the statute at issue in *Heike v. United States,* 217 U.S. 423 (1910). In *Heike,* an immunity statute stated that "[n]o person shall be prosecuted" who testified or produced evidence pursuant to that

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[4] *United States v. Meyer,* 157 F.3d 1067, 1071 (7th Cir. 1998).

[5] *United States v. Verrusio,* 803 F.2d 885, 886-87 & n.1 (7th Cir. 1986).

[6] *United States v. Bailey,* 34 F.3d 683, 690 (8th Cir. 1994).

[7] *United States v. Eggert,* 624 F.2d 973, 974-76 (10th Cir. 1980).

statute. 217 U.S. at 431. Like SNTG, Heike argued "that the complete immunity promised is not given unless the person entitled to the benefits of the act is saved from prosecution, for . . . if the act is to be effective, it means not only immunity from punishment, but from prosecution as well." *Id.* The Supreme Court rejected this argument holding "that the statute does not intend to secure to a person making such a plea immunity from prosecution, but [only] to provide him with a shield against successful prosecution, available to him as a defense." *Id.*

SNTG wrongly claims that interlocutory-appeal cases such as *Heike* "shed[] no light on the ability of a federal court to enjoin a prosecution that is barred by such an agreement." S.Pet. 9. If the promises in the statutes or agreements at issue in those cases had been interpreted to create a right not to be indicted or a right not to be tried, as the defendants in those cases claimed, then an order denying a motion to dismiss the indictment could be an appealable order, just like an order denying a double-jeopardy claim. *See Abney v. United States*, 431 U.S. 651, 661 (1977). Thus, the panel correctly noted that interlocutory-appeal cases such as *Heike* "are instructive because they reinforce the narrowness of a defendant's ability to challenge the Government's decision to pursue a prosecution." 442 F.3d at 186; *see Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) ("critical question [under collateral order doctrine] is whether 'the essence' of the claimed right is a right not to stand trial" (citation omitted)); *We, Inc. v. Philadelphia*, 174 F.3d 322, 326 (3d Cir. 1999) (same).

SNTG's effort (S.Pet. 7-8) to explain away the Seventh Circuit's *Meyer* decision and similar cases as limited to their specific facts is wrong. In the written immunity agreement with defendant Hoff in *Meyer*, "the *government promised . . . not to charge him* with any criminal violations . . . ." 157 F.3d at 1071 (emphasis added). As in this case, "[d]ue to the perceived breach of the immunity agreement by Hoff, the government believed that it was relieved of its obligation to refrain from prosecuting him." *Id.* at 1072. After he was indicted, Hoff unsuccessfully moved to dismiss the indictment arguing, as SNTG does in this case, "that due process required a pre-indictment determination of his breach." *Id.; accord id.* at 1076.

After his conviction, Hoff's only claim on appeal was that "due process required a pre-indictment hearing to determine breach." *Id.* at 1076. The Seventh Circuit, relying on an earlier decision that had addressed a similarly worded agreement,[8] held that "[t]he benefit" that Hoff received from the government's agreement that it "*would not charge him* . . . was to avoid the risk of conviction." *Id.* at 1077 (emphasis added). The court therefore held that "[t]he district court's [post-indictment but] pretrial evidentiary hearing satisfied . . . all of the protection demanded by due process." *Id.* SNTG points to nothing that distinguishes *Meyer* from this case.[9]

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[8] *United States v. Verrusio,* 803 F.2d 885, 886-87 & n.1 (7th Cir. 1986) (government agreed that "it would not file additional charges").

[9] Any suggestion that this case is somehow unique because the Agreement was executed prior to any indictment ignores the plain language at issue in the cases discussed above (*see, e.g.,* n. 8 *supra),* and cases such as *Bailey,* in which the non-

II. No Court Has Enjoined A Federal Prosecutor From Seeking An Indictment To Protect "Property Rights"

1. SNTG argues that it has a "property right" not to be indicted that a federal court can protect by issuing an injunction against the criminal prosecution. S.Pet. 9-11; S.Let. 2. As we explained above, however, unanimous case law rejects the claim that promises indistinguishable from those in the Agreement create a right not to be indicted. Absent extraordinary circumstances not present in this case (442 F.3d at 187), courts of equity do not interfere with criminal investigations, and none of the cases SNTG cites ordered a federal prosecutor not to seek an indictment against the target of an on-going criminal investigation to protect a "property right."

In *In re Sawyer*, 124 U.S. 200, 210-11 (1888), the Supreme Court compared the equitable jurisdiction of the courts of the United States to the equitable jurisdiction exercised by the English Court of Chancery in 1789. The Court observed that "[f]rom long before the Declaration of Independence, it has been settled in England, that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery." *Sawyer*, 124 U.S. at 210. Early American commentators such as Justice Story also concluded that courts of equity "will not interfere to stay proceedings in any criminal matters, or in any case not strictly of a civil nature" (Story, J., Commentaries on Equity Jurisprudence § 893 (1984 reprint of Jairus Perry ed., Little, Brown, and Co. 1877) p. 79 (1836)), and American courts "strictly and uniformly upheld" this rule after 1789.

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prosecution agreement also was signed prior to indictment. 34 F.3d at 685-86.

Sawyer, 124 U.S. at 211.

For these reasons, the Court in *Sawyer* concluded that a "court of equity . . . has no jurisdiction over the prosecution, the punishment or the pardon of crimes." 124 U.S. at 210. The Court also noted that to exercise such jurisdiction would be "to invade the domain of the courts of common law, or of the executive . . . department of the government." *Id*. The panel's conclusion that the district court "lacked authority to employ the extraordinary remedy of enjoining" an indictment in this case (442 F.3d at 187) is completely consistent with this precedent.

SNTG's contention (S.Pet. 9-11, S.Let. 2) that the panel's decision conflicts with Supreme Court cases that, it claims, permit a court to enjoin a prosecutor from seeking an indictment during a grand jury investigation to protect a corporation's property rights is simply wrong. None of the cases SNTG cites approved an injunction preventing an indictment of a target of an ongoing federal grand jury investigation. All of the cases on which it primarily relies involve a pre-enforcement facial challenge to an allegedly unconstitutional statute or unauthorized rule. Thus, those cases do not undermine the rule of *Sawyer*.

For example, *Truax v. Raich*, 239 U.S. 33, 35-36 (1915), involved a facial challenge to the constitutionality of a state law placing limits on employers hiring persons who were not "qualified electors or native-born citizens." The case was filed by Raich, an Austrian-born employee who was not a qualified elector and who had

been told by his employer that he "would be discharged." *Id*. at 36. Had Raich been discharged, he would have had no adequate remedy at law to challenge the statute because only employers were subject to criminal prosecution. *Id*. at 39. The Court found that the state law was unconstitutional on its face. *Id*. at 40-43.

Similarly, in *Hynes v. Grimes Packing Co*., 337 U.S. 86, 91-98 (1949), commercial fisherman sought an injunction against the Regional Director of the Fish and Wildlife Service who was supposed to enforce a Department of the Interior regulation that excluded fisherman from certain Alaskan coastal waters. The Court declared the regulation "void" because it violated section 1 of the White Act, 44 Stat. 752 (1926), 337 U.S. at 122-23; the result of this finding was an injunction against future enforcement of the invalid regulation. 337 U.S. at 127. That case concerned a facial challenge to the regulation and did not involve what SNTG seeks here – an injunction against an indictment of a particular party for a completed act – but rather the invalidation of a regulation to prevent its future enforcement. Thus the *Hynes* Court did not prevent a prosecutor from deciding to prosecute an actual committed crime because no violation had occurred and, therefore, there was no prosecutor involved and no indictment under contemplation for such an act.[10]

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[10] In *Majuri v. United States*, 431 F.2d 469 (3d Cir. 1970), defendants in a criminal case filed a post-indictment injunction case challenging the constitutionality of the federal loansharking statute at issue in their criminal case. Both cases were assigned to the same district court judge who dismissed the civil complaint. This Court affirmed. Since the civil case was filed post-indictment and ultimately dismissed, this Court's decision does not support SNTG's arguments in

Thus, no court has ever protected "property rights" by interfering with an ongoing federal grand jury investigation. Indeed, we are aware of no case in which "a federal court [has] enjoined a federal prosecutor's investigation or presentment of an indictment." *Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987). As the *Deaver* court observed, since *Younger v. Harris*, 401 U.S. 37 (1971), "the Supreme Court has upheld federal injunctions to restrain state criminal proceedings only where the threatened prosecution chilled exercise of First Amendment rights." 822 F.2d at 69.

Finally, SNTG wrongly claims that the panel misread the law and that "the panel decision (even as amended) forecloses the availability of injunctive relief to protect property rights." S.Let. 2. In fact, the panel fully recognized the holdings of the cases SNTG cites (442 F.3d at 183), but it concluded that "this case does not implicate th[e] concern" addressed by the Supreme Court in them because SNTG's underlying "contention that the immunity [it] purportedly received under the Agreement precludes an indictment in the first place is belied by precedent." *Id.* at 187.

2. SNTG's contention that the panel should not have relied on separation-of-

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this case. In *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912), plaintiff sought an injunction against the Secretary of War who, it claimed, was interfering with its use of certain property the Secretary had determined to be within navigable waters. Unlike SNTG in this case, the plaintiff in *Stimson* was not "attempt[ing] to restrain . . . the grand jury from the exercise of its functions." 223 U.S. at 621. The Court held the Secretary acted constitutionally. *Id.* at 638. Finally, in *Zemel v. Rusk*, 381 U.S. 1, 18-20 (1965), the Court refused to consider the validity of restrictions imposed on travel to Cuba, noting that plaintiff's allegations concerning his future travel plans were too vague.

power concerns in refusing to grant SNTG injunctive relief (S.Pet. 11-15) is based on two false assumptions and, in any event, is wrong.

First, SNTG's contention is based on the faulty premise that the Agreement precludes indictment. As we have already observed, however, this premise ignores the unanimous case law rejecting claims that language in statutes and agreements that is indistinguishable from the language in the Agreement did not create a right not to be indicted or prosecuted.

STNG's second premise, that the Division "willingly participated" in the district court's proceedings (S.Pet. 13), is plainly false because it ignores the Division's objections to those proceedings.[11] Notwithstanding the Division's objections, the district court did not address the Division's claim that it lacked jurisdiction to enjoin a prosecutor from seeking an indictment and proceeded to have an evidentiary hearing. At that point, the Division did what any sensible litigant would do – it participated in the hearing, subject to its objections, to make a record in case its procedural objections were rejected on appeal and it had to address the merits of SNTG's complaint. Similarly, while the Division honored the district court's request (JA28, 51, 644) not to seek an indictment to allow the court time to decide the case, that common courtesy did not waive the Division's objections both to the hearing itself and to plaintiffs' claims. The Division should not be penalized for respecting a judicial request after

[11] *See* US Reply Br. at 8-9 (discussing Division opposition to any pre-indictment hearing).

properly lodging its objection.

Finally, allowing a court to review a prosecutor's decision to indict or to deny, grant, or revoke leniency prior to indictment would result in an unconstitutional intrusion into the authority given to the Executive Branch in the Constitution to enforce the laws of the United States. The "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). Thus, the power to decide *whether* to bring charges, *what* violations to charge, and *when* to file those charges belongs to the Executive Branch and the grand jury. *E.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985); *In re United States*, 345 F.3d 450, 452-54 (7th Cir. 2003); *In re Grand Jury Proceedings*, 525 F.2d 151, 156-57 (3d Cir. 1975); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions").[12] Of course, as the panel correctly observed (442 F.3d at 186), once the government exercises its prosecutorial discretion by seeking an indictment, and if the grand jury returns an indictment, SNTG can raise the Agreement as a defense to that indictment and a court can adjudicate that defense.

[12] Unlike SNTG, the plaintiffs in *Smith v. Meese*, 821 F.2d 1484, 1489 (11th Cir. 1987) (S.Pet. 12), were not a "'target' of an investigation or prosecution" and did "not challenge any particular decision to prosecute or not to prosecute any individual."

CONCLUSION

The Petitions for Rehearing en banc should be promptly denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, John P. Fonte, hereby certify that on this 9th day of June 2006, I served two copies of the foregoing Answer Of The United States of America To Petitions For Rehearing En Banc, by Federal Express, on:

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